

**NATIONAL LABOR RELATIONS BOARD
REGION 28**

INTERNATIONAL ASSOCIATION OF	:	CASE NO: 28-RC-201988
HEAT & FROST INSULATORS AND	:	
ASBESTOS WORKERS, LOCAL	:	
UNION 76	:	
	:	
Petitioner,	:	EMPLOYER’S REQUEST FOR
	:	REVIEW
and	:	
	:	
CLASSIC INDUSTRIAL SERVICES,	:	
INC.	:	
	:	
Respondent	:	

The Employer, Classic Industrial Services, Inc. (“Classic” or “Employer”) submits this Request for Review under Sections 102.69 (c)(2) and 102.67 of the Board’s Rules and Regulations of the Regional Director’s October 17, 2017 Decision and Certification of Representative (the “Order”).

Pursuant to Section 102.67 of the Board’s Rules and Regulations, the Request for Review must be granted because the Regional Director erroneously found that certain Classic employees are statutory supervisors and this error prejudicially affects Classic’s rights. This finding resulted in a Certification of Bargaining Representative.

PROCEDURAL BACKGROUND

On July 7, 2017, the International Association of Heat & Frost Insulators and Asbestos Workers, Local Union 76 (“Union”), filed a petition with Region 28 of the NLRB, seeking recognition as the bargaining representative for certain Classic Industrial employees. (Board Exhibit 1(a)). Pursuant to a Stipulated Election Agreement, a secret ballot election was scheduled for July 28, 2017. (Board Exhibit 1(a)). The Stipulated Election Agreement identified the Unit and Eligible Voters to include: “All full-time and regular part-time helpers, welders, mechanic metal workers, mechanic insulators, and mechanic pipe workers employed by the Employer at the APS Plant in Fruitland, New Mexico.” (Board

Exhibit 1(a)) Excluded were “[a]ll other employees, office clerical employees, scaffold workers, guards, and supervisors as defined by the Act.” (Board Exhibit 1(a)).

Following the July 28th election, the tally of ballots provided the following results:

Approximate number of eligible voters	107
Number of votes cast for Petitioner	32
Number of votes cast against participating labor organization	8
Number of valid votes counted	40
Number of challenged ballots	38
Number of valid votes counted plus challenged ballots	78

(Board Exhibit 1(a)).

On August 21 through August 23, a hearing was conducted and the parties were given an opportunity to present evidence regarding challenged ballots and election objections. (Board Exhibit 1(a)). At the hearing, Classic Industrial agreed to withdraw its objection to certain election conduct, and the parties mutually agreed that challenges to six ballots should be sustained.

The parties continued to dispute, and presented evidence regarding, a remaining total of 32 challenged ballots. Four ballots were challenged on the basis of alleged supervisory status. On September 15, 2017, Hearing Officer Sandra L. Lyons issued a report recommending that the Union’s challenges to 10 ballots should be sustained, and that those ballots should not be opened or counted. (Hearing Officer’s Report on Challenged Ballots, “Report,” at pg. 1). The Hearing Officer overruled the Union’s challenges to the remaining 22 ballots at issue. (Report pg. 1).

On September 29, 2017, Classic filed Exceptions to the Hearing Officer’s Report. (“Exceptions”). The Exceptions disputed the Hearing Officer’s findings with respect to all 10 sustained challenges. No exceptions were filed regarding the 22 overruled challenges.

On October 17, 2017, the Regional Director issued the Order. The Regional Director affirmed the Hearing Officer’s findings. (Order p. 1). The Regional Director concluded that the 22 overruled challenges were insufficient to affect the results of the election and certified the Union as the bargaining

unit representative. (Order p. 1). If each of the 22 overruled challenges were cast against the Union, there would have been 32 ballots cast for representation and 30 ballots cast against representation. (Order p. 1). In other words, if the Regional Director erroneously affirmed just two of the challenges, it would be sufficient to affect the results of the election.

Three of the sustained ballots were sustained on the basis of alleged supervisory status. These ballots belong to David Trevino, Juan Godoy, and Jose Gonzalez-Flores. (Report pg. 9). Classic is seeking review of the Order only with respect to these three ballots and the finding that they are “supervisors” within the definition Section 2(11) of the National Labor Relations Act (“Act”). As detailed below, the Regional Director’s determination was clearly erroneous and must be reviewed.

SUMMARY OF EVIDENCE AND RULINGS

Classic is a commercial and industrial contractor with its headquarters located in Baton Rouge, Louisiana. Tr. 218:16-17. Classic provides scaffolding, insulation and welding services at a power plant located in Fruitland, NM. Tr. 250:21-251:20. The plan consists of different “units” that are capable of producing varying amounts of electrical energy. Tr. 212:24-213:6. There are four units inside the parameters of the fence of the plant. *Id.*

The employees in question are working foremen or foremen (the terms are used interchangeably). Directly under foremen are mechanics A and B. Tr. 210:11-14. On the insulation side, a mechanic A works in metal and the mechanic B works as insulators. Tr. 210:15-20. On the scaffold side, a mechanic A is like a “lead man,” and a mechanic B is like a carpenter. Tr. 210:22-24. There are also welders and helpers. Tr. 211:4-7.

The Hearing Officer found there was no evidence that the foreman “have the ability to hire, transfer, suspend, lay off, recall, promote, discharge, reward or discipline other employees or to adjust

their grievances or to effectively [sic] recommend such action.” (Report p. 8).¹ Instead, her determination was solely based on her conclusion that foremen direct employees. (Report p. 8).

The Regional Director affirmed this finding on the basis that the foremen “possess the ability to responsibly direct employees at the jobsite using independent judgment and discretion.” (Order p. 3). In particular, the Regional Director found that the foremen decide where crew members will work, conduct safety inspections, and inspect work. (Order p. 4). He also found that foremen can be disciplined for the work of their crew members. (Order p. 4). Because the Regional Director’s finding was based on foremen’s alleged ability to direct crew members, the following summary of evidence will focus on that particular issue.

A. Testimony About Work Assignments

The details of each work assignment come from blueprints, such as a print of a duct or piping. Tr. 246:19-21. The blueprints outline details such as whether a pipe needs insulation, the thickness of the insulation, the temperature of the insulation, etc. Tr. 246:19-24. If there is an issue with the specifications that are given, employees cannot deviate from the blueprints without express permission from the superintendent. Tr. 248:11 – 21.

Director of Craft Resources and Training Development Thomas “Kevin” Bergeron (“Bergeron”) explained that general foremen meet with foremen each day and “show them exactly what needs to be done” by going over specifications. Tr. 205:15-22. General foremen are responsible for determining work placement each day, and pairing each employee with a working foreman. Tr. 20:11 – 17; 60:24 - 61:2; Tr. 26: 4 – 15; Tr. 29:17 – 20. As Union witness Luis Lopez succinctly put it, “[t]he instructions were [sic] all the workers would come from the general foreman. . . . Directly from the general foreman.” Tr. 61:1 – 4.

¹ Both Union and Employer witnesses consistently testified that these types of decisions were made by a General Foreman or a Superintendent. *See* Tr. 28:25 – 29:6; 57:25 – 60:17; 160:14 - 161:15; 227:21 – 228:5; 272:25 – 275:1.

Project Coordinator Joshua Jones (“Jones”) summarized the foreman position as follows: “he . . . is there to direct the crews to make sure they’re following the specs. And he’s there to make sure that they’re getting the job done and doing the right thing when they’re doing it, as in following the specs.” Tr. 270:7-10.

Both Union and Employer witnesses testified that foremen assign workers in their crew to work areas. Lopez worked as a foreman of the welders for approximately two weeks before resigning from Classic. Tr. 21:24-22:1. Prior to working as a foreman, Lopez was a welding mechanic. Tr. 22:2-4. Lopez testified that the welder foreman “would place” the welders and “tell [them] where [they] would be working” (i.e., which unit to work on at the site). Tr. 27:13-19. When asked how he determined where to “place” welders during his brief stint as foreman, Lopez testified that he did so “according to how each one is capable of doing what. And which one is better - - works better than the other one.” Tr. 29:18-20. But Lopez also testified, “[The General Foreman] showed me the work plans and how to arrange people . . . He gives me a place of where to work, and the people that he wants me to work with.” Tr. 29:19 – 30:1.

There was a variety of testimony about what foremen do after designating work areas. Lopez testified that the insulation foreman spends 80% of his time “putting insulation” and 20% of his time “going around and explaining to his workers how to do their job.” Tr. 61:20-25. Lopez claimed that one foreman, Trevino, spent all of his time telling employees where they should work and how they should work. Tr. 62:1-5. Jones testified that foreman are performing production work 90% of the time. Tr. 271:19-23.

Union witness Gustavo Frias testified that foremen “supervise” people and “make sure they’re doing the right thing.” Tr. 96:6-9. He then elaborated that this meant providing workers with measurements and ensuring that the material is installed. Tr. 96:14-17.

However, other layers of management are also regularly present. Frias testified that the general foreman was “around about three or four times a day checking the work.” Tr. 96:25-1; Bergeron testified that “General foremen are in the field all day with the exception of maybe, I don’t know, an hour or so where they may go into their office and do their timesheets.” Tr. 205:23-206:2. Bergeron also testified that the project coordinator is also on the jobsite on a daily basis to check the lines and duct work. Tr. 204:23-205:4.

B. Testimony About Accountability

There was minimal testimony about whether a foreman is accountable for his crew’s performance. And, the testimony in this regard is vague and speculative. Bergeron testified that if a foreman does not ensure that the work “gets done”, he would “have to explain to his general foreman why that work didn’t get done.” Tr. 244:19-22. He further stated if a foreman has a “pattern of not getting the work done” by virtue of his own fault, then there would most likely be an evaluation as to “what this foreman actually knows and how he performs his work.” Tr. 245:6-11.

The foreman might be trained more or moved back into a mechanic A position, but he would not necessarily be “disciplined.” Tr. 245:10-19. When pressed, Bergeron agreed that a foreman could be disciplined for not getting a job done, but he could not think of an example in which a foreman was disciplined for not getting the job done at the Fruitland plant, or at any other plant. Tr. 254:1-11. There were no examples of an instance when a foreman was moved to a Mechanic A position.

C. Testimony About Safety Inspections

There is little evidence that foremen have any obligations with respect to safety inspections. Bergeron testified that the foremen participate in the safety task assessments (“STA”) that are conducted each morning. The purpose of the STA is:

To make sure that the crew fully understands their task, because they get moved around in different areas. So whenever you move a crew, you have to have a STA to perform that work. And that STA is a collaboration of everyone in that crew. You got your A

Mechanics, your B Mechanics and your helpers. So everybody inputs to make sure that area that moving is, is safe before they begin work.

Tr. 272:1-9.

When the workers get to their work area, “they go to the STA and fill that out.” Tr. 324:4-9.

The remainder of the testimony about safety issues and safety inspections clarified that certain employees are responsible for safety. Bergeron testified that there are “safety employees” at the Fruitland plant, whose sole responsibility is ensuring compliance with safety rules. Tr. 254:16:17.

The Union witnesses consistently testified that an employee who is not currently at issue, Vincent Jaquez, was responsible for safety. Tr. 42:5-9 (Lopez discussing Vincent Jaquez); Tr. 109:16 – 110:17 (Frias explaining Jaquez performs safety inspections, and “inspects that the people - - or make sure that the people are doing a safe job around the plant”).

ARGUMENT

It is well-established that a “party seeking to exclude an individual from voting has the burden of establishing that the individual is, in fact, ineligible to vote.” *Iberia Road Markings Corp.*, No. 29-CA-27930, 2007 NLRB LEXIS 183, at *50 (May 18, 2007). The Union challenged the three employees presently at issue and, as such, the burden was on the Union to show in each instance “that the challenged employees did not perform bargaining-unit work, not on the Employer to show that they did.” *Sweetener Supply Corp.*, 349 NLRB 1122, 1122 (2007).

Section 2(11) of the Act defines the term supervisor as:

Any individual having authority in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

Importantly, the Union retains the burden of establishing supervisory status and, where the evidence is conflicting or inconclusive, the Board finds that supervisory status has not been established.

Phelps Community Medical Center, 295 NLRB 486, 490 (1989) Moreover, “purely conclusory evidence is not sufficient to establish supervisory status;” rather, the Board “requires evidence that the employee actually possesses the Section 2(11) authority at issue.” *Golden Crest Healthcare Center*, 348 NLRB 727, 731 (2006).

A. The Foremen Do Not Use Independent Discretion in Designating Work Areas

The Regional Director found erred in finding that foremen use independent discretion in assigning work.

First, “[a]ssigning employees according to their known skills is not evidence of independent judgment.” *Shaw, Inc.*, 350 NLRB 354, n. 9 (2007). For example, in *UPS Ground Freight, Inc.*, 365 NLRB No. 113 (July 27, 2017), the Board held that a UPS dispatcher who assigned drivers to specific routes was not a statutory supervisor. The dispatcher received direction about daily routes and stops. He then had the responsibility of assigning a driver to each route. *Id.* The dispatcher often designated drivers based on their preference, but he sometimes considered a driver’s skills in determining their route assignment. *Id.* There was no evidence that the dispatcher could require a driver to accept the route assignment – if a driver rejected the route the dispatcher would refer him or her to management. *Id.*

The Board concluded that the dispatcher did not exercise meaningful discretion in assigning routes. Indeed, the drivers’ “established skill sets were largely determinative of what routes they would be assigned.” *Id.*

Similarly, the Board has consistently found that assigning or directing work pursuant to blue prints or specifications does not require independent discretion. In *Volair Contractors, Inc.*, 341 NLRB 673 (2004), the individual in question was responsible for laying out the job and assigning tasks to his crewmembers with reference to a blueprint provided by management. *Id.* The Board held that this “circumscribed authority does not indicate the use of independent judgment.” *Id.*

In *Electrical Specialties, Inc.*, 323 NLRB 705 (1996), the employees in question “laid out the work pursuant to the general contractor’s specification, they ordered materials, signed purchase orders and directed the other electricians to do the work in accordance with the specifications.” The Board held these employees were not statutory supervisors, in part, because “their assignments of work to other employees were based upon the existing specifications and were routine in nature.” *Id.*

The consistent oversight by another layer of supervisors also cuts against the finding of supervisory status. *Shaw, Inc.*, 350 NLRB 354 (1997). In *Shaw*, the Board noted that the employees’ (foremen) direction was subject to “close scrutiny” by higher management. *Id.* Specifically, management visited the jobsite in question “at least once a day, checking on progress and providing guidance as needed.” *Id.* Foremen also had means of communicating with higher management if they were not on site. *Id.* Thus, the Board held that the foremen served “as a conduit for carrying out the Respondents’” assignments, and that the work “[was] regularly monitored by individuals who ha[d] both the authority and responsibility to ensure its proper performance.” *Id.*

Lastly, generalized testimony about the discretion to direct employees is not sufficient to establish supervisory status. *SR-73 and Lakeside Avenue Operations LLC*, 365 NLRB No. 119 (Aug. 17, 2017). For example, in *Lakeside Avenue*, a nurse testified that she considered employee skill level and patient acuity when assigning a cart nurse to an open slot. *Id.* The Board rejected her testimony because she failed to provide any such examples. *Id.*

Here, foremen get directions from general foremen. The general foremen review the specs with the foremen and tell them where their crew will be working on a particular day. Based on those directions, foremen “place” crew members into individual areas. But there was little testimony about how a foreman makes that determination. Lopez, who only worked as a foreman for approximately two weeks, testified that he designated welders to work areas based on their “capabilities.” Tr. 28:18-20. Lopez did not elaborate on this topic or give any specific examples of when he made these

determinations. This type of conclusory evidence should be rejected as it was in *Lakeside Avenue*. Notwithstanding, assigning crew members based on their general skills does not require independent discretion. There is also no indication that a crew member would suffer any sort of consequence if he refused a foreman's assignment. The foreman would have to raise any sort of concern to the general foreman.

Second, the details of the work is predetermined. Like the employees in *Volair* and *Electrical Specialties*, the details of each assignment at Classic are established through blue prints and specifications. The blue prints and specifications contain measurements. The general foremen convey this information to the foremen, and the foremen relay the measurements and specifications to the crew. In "overseeing" or "inspecting" this work, the foremen simply ensure the work matches up with the prescribed measurements/criteria. This is routine in nature.

Finally, the general foremen and other managerial employees regularly check the work product. General foremen are in the field for almost the entire day, and even the Union's witnesses admitted the general foremen inspected their work three or four times per day.

The foremen are similar to the foremen in *Shaw* – they serve as a conduit for the general foremen and the work area is subject to constant oversight by the general foremen (i.e., the individuals who can impose discipline or otherwise impact employment).

B. The Foremen Are Not Accountable for the Work of Others

Although the Regional Director concluded foremen are held "personally liable for the performance of their subordinates," there is no evidence to support this conclusion. The Regional Director relied solely on the speculative testimony of Bergeron to support this conclusion.

In *Atlantic City Electric Co.*, 2017 NLRB Reg. Dir. Dec. LEXIS 48 (Mar. 17, 2017), the Regional Director for Region 4 explained:

[A]n individual will be found to have the authority to responsibility direct other employees only if the individual is *accountable* for the performance of the tasks by the other employee. Accountability means that the employer has delegated to the putative supervisor the authority to direct the work and the authority to take corrective action if necessary, and the putative supervisor faces the prospect of adverse consequences if the employees under his or her command fail to perform their tasks correctly.

Foremen do not have the authority to take corrective action if a crew member provides subpar work. Bergeron *speculated* that a foreman could be demoted if the work was consistently not being performed and it was the foreman's fault. Bergeron was unable to provide a single example of this actually happening. As noted above, speculative testimony is insufficient to prove supervisory status.²

C. Foremen Have Minimal Safety-Related Duties

The Regional Director found:

part of a foreman's job is to make safety task assessments of their crew. There is no evidence that foremen relied on any sort of manual or established policies or procedures in executing their tasks and directing employees. Each foremen uses their own discretion.

(Order p. 4).

Again, there is scant testimony to support this conclusion. There was testimony that foremen conduct STAs, but the testimony indicated STAs are a collaborative effort with all employees in that area. It is unclear whether the STAs are based on set criteria, because there were no questions to this effect. Notwithstanding, it appears to be undisputed there are designated safety employees. "Safety training" is not an established aspect of the foreman position.

² Even if the Board found that foremen are held accountable for the overall work of the crew, that is not determinative. In *Croft Metals, Inc.*, 348 NLRB 717 (2006), the Board found that the employees in question were accountable for purposes of responsible direction but determined they were not supervisors. There was evidence the employer had disciplined lead persons when their crew failed to meet production goals. However, the responsible direction was not exercised with independent judgment and it did not involve a degree of discretion that rise above "routine or clerical." *Id.*

CONCLUSION

The Regional Director's Order is clearly erroneous, as it is not supported by the testimony at the hearing. Based on the foregoing reasons, the Board should grant Classic's request for review.

Dated: October 31, 2017

Respectfully submitted,
JACKSON LEWIS P.C.

By: *__/s/ Joseph Dreesen_____*

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CERTIFICATE OF SERVICE

I, Joseph Dreesen, certify that on October 31, 2017, I caused the *Employer's Request for Review to the National Labor Relations Board* in the above-captioned matter to be filed electronically.

The undersigned also hereby certifies that on October 31, 2017, a true and correct copy of the above and foregoing document was served on International Association of Heat & Frost Insulators and Asbestos Workers, Local Union 76, Attorneys Caroline N. Cohen and David W.J. Fujimoto, via electronic mail at nlrbtnotices@unioncounsel.net, ccohen@unioncounsel.net, and dfujimoto@unioncounsel.net and Regional Director of Region 28 of the National Labor Relations Board Cornele Overstreet at cornele.overstreet@nlrb.gov

/s Joseph Dreesen
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